Filed 8/4/03 P. v. Netherly CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEVONTE NETHERLY, Defendant and Appellant.	B162330 (Los Angeles County Super. Ct. No. BA232273)

APPEAL from a judgment of the Superior Court for Los Angeles County, Alice E. Altoon, Judge. Affirmed.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Jaime L. Fuster, Supervising Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and Appellant Devonte Netherly appeals from a judgment sentencing him to 12 years in state prison after a jury found him guilty of robbery and possession of a sawed-off shotgun, and found to be true an allegation that defendant personally used a firearm in the commission of the robbery. Defendant contends on appeal that there was insufficient evidence to support the jury's finding that he personally used a firearm and that his 12-year sentence was grossly disproportionate to the offense and thus constituted cruel and/or unusual punishment. We affirm the judgment.

BACKGROUND

At approximately 8:20 p.m. on the evening of June 1, 2002, Los Angeles Police Officer Roselena Mejia (Mejia) and her partner were on routine patrol when Mejia saw three men running toward a red Ford Escort. One of the men, identified at trial as defendant, was carrying a sawed-off shotgun. The officers drove up to the car as the men were getting into it. Mejia saw defendant drop the shotgun onto the street between the parked car and the sidewalk.

The officers conducted a "high-risk vehicle stop," ordering the men to get out of the car and lie down on the ground. While they were conducting the vehicle stop, two men, Tomas Vicuna (Vicuna) and Eusebio Alcibar (Alcibar), approached Mejia and told her (in Spanish) that they had been robbed. Vicuna identified the men on the ground as the men who had robbed him and Alcibar.

Defendant was arrested and charged by information with one count of second degree robbery (count 1), a violation of Penal Code[1] section 211, and one count of possession of a short-barreled shotgun (count 2), a violation of section 12020, subdivision (a). In addition, the information alleged that defendant personally used a firearm in the commission of the robbery, within the meaning of section 12022.53, subdivision (b).

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

At trial, Vicuna testified that defendant and two other men approached him while he was standing at a bus stop with his cousin, Alcibar. When defendant was about two or three feet in front of him, defendant showed Vicuna the shotgun he was holding (the shortened stock of the shotgun was under defendant's sweatshirt, but most of the gun was visible) and told Vicuna and Alcibar not to move. Vicuna did not understand what defendant said because defendant spoke in English and Vicuna understands very little English, but defendant's companions spoke to Vicuna in Spanish and told him to give them his wallet. He did, because he was afraid he would be shot. After the men removed the money from the wallet, Vicuna asked if he could have his wallet back because it held his papers. They returned the wallet to Vicuna and left. Vicuna and Alcibar were about to leave to return to their house when they saw a police car drive by and stop the men. They walked over to the police officers and told them that the men had just robbed them.

Police Officer Andrew Paredes testified at trial that he spoke with defendant at the police station, after reading defendant his *Miranda*[2] rights. During that conversation, defendant told Paredes that he and two friends walked up to two men, asked them for money while defendant held a shotgun, and took their money. When Paredes asked him whose shotgun he was holding, defendant told the officer it was his. Paredes asked him to write down what he had told him, and defendant did so. Defendant's written statement was admitted into evidence.

Defendant testified in his defense. He admitted that he and two friends walked up to two men standing at a bus stop in order to take their money. He also admitted that he held a shotgun, although he said that the gun was inside the left sleeve of his sweatshirt and that he never displayed the gun to or pointed it at Vicuna or Alcibar.

The jury found defendant guilty of both counts and found true the allegation that he personally used a firearm in the commission of the robbery. The trial court sentenced defendant to 12 years in prison, computed as follows: the low term of two years plus a

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

10-year enhancement for the gun use allegation on count 1, and the low term of 16 months on count 2, to be served concurrently with the sentence for count 1. Defendant filed a timely appeal from the judgment.

DISCUSSION

A. Gun Use Allegation

Defendant contends that there was insufficient evidence that he "used" a firearm in the commission of the robbery, as required by section 12022.53, subdivision (b). Instead, defendant argues, the evidence at trial supports only a finding that he was "armed" with a firearm within the meaning of section 12022.

"'"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact."' [Citations.] '"[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.'" [Citations.] Our role is limited to determining whether the evidence before the trier of fact supports its findings. [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766, italics in original.)

Several California cases have addressed the meaning of the phrase "used a firearm" as provided in various statutes. (See, e.g., *In re Tameka C.* (2000) 22 Cal.4th 190 [discussing section 12022.5, subdivision (a) and section 1203.06]; *People v. Masbruch* (1996) 13 Cal.4th 1001 [discussing section 12022.3, subdivision (a)]; *People v. Bland* (1995) 10 Cal.4th 991 [comparing section 12022, related to being "armed" with a firearm, with section 12022.5, related to "using" a firearm]; *People v. Granado* (1996) 49 Cal.App.4th 317 [discussing section 12022.5, subdivision (a)] (*Granado*).) The courts in these cases and others acknowledge that the intent of the various gun use enhancement statutes "is to '"deter persons from creating a potential for death or injury resulting from

the very presence of a firearm at the scene of a crime"' [citation], and to '"deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use."' [Citation.] " (*In re Tameka C.*, *supra*, 22 Cal.4th at p. 196.)

The Supreme Court has instructed that, in light of the intent of the enhancement statutes, the term "use" should be broadly construed: "As one Court of Appeal has put it: 'In other words, the term "use," as employed in [these] statute[s] . . . should be broadly construed, consistent with common usage, to check the magnified risk of serious injury which accompanies any deployment of a gun in a criminal endeavor." (*In re Tameka C.*, *supra*, 22 Cal.4th at p. 196, quoting *Granado*, *supra*, 49 Cal.App.4th at p. 322.) The court noted that it has held that "a firearm-use allegation may be established as true if the defendant 'utilized the gun at least as an aid in completing an essential element of the [underlying] crime. . . .'" (*Id.* at p. 197, quoting *People v. Chambers* (1972) 7 Cal.3d 666, 672-673; see also *Granado*, at p. 325 ["In our view, if the defendant is found on substantial evidence to have displayed a firearm in order to facilitate the commission of an underlying crime, a use of the gun has occurred both as a matter of plain English and of carrying out the intent of section 12022.5(a)"].)

In the present case, the victim, Vicuna, testified that defendant displayed a shotgun and told him not to move, while defendant's companions demanded Vicuna's wallet. Although defendant testified that he did not display the shotgun, and instead kept it hidden in the sleeve of his sweatshirt, the jury could, and apparently did, disbelieve defendant's testimony and believe Vicuna's account of the robbery. Therefore, we hold there is sufficient evidence to support the jury's finding that defendant "used" a firearm in the commission of the robbery.

B. Cruel and/or Unusual Punishment

Section 12022.53 provides for a mandatory 10 year sentence enhancement if a person who commits any of certain enumerated felonies personally uses a firearm in the commission of that felony. (See § 12022.53, subd. (a) [listing felonies subject to

enhancement] and subd. (b) [10 year enhancement for use of firearm].) The statute also provides that a court cannot strike a gun use allegation or finding under section 1385 "or any other provision of law." (§ 12022.53, subd. (h).) Nevertheless, a mandatory punishment provided by law may violate constitutional principles; under those circumstances, the court has the authority to prevent an unconstitutional sentence from being imposed. (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) Defendant contends that this is such a case. He argues that the 10-year gun use enhancement imposed under section 12022.53 resulted in a punishment that is so grossly disproportionate to his individual culpability as to constitute cruel and/or unusual punishment under both the United States and California Constitutions. (See U.S. Const., 8th Amend. [prohibiting imposition of cruel and unusual punishment]; Cal. Const., art. I, § 17 [prohibiting imposition of cruel or unusual punishment].)

The California and federal constitutional provisions both have been interpreted to prohibit a sentence that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see also *Ewing v. California* (2003) ___ U.S. ___, ___, 123 S.Ct. 1179, 1185 (plur. opn. of O'Connor, J.) (*Ewing*); *id.* at p. 1191-1192 (dis. opn. of Stevens, J.); *Harmelin v. Michigan* (1991) 501 U.S. 957, 962; *People v. Dillon*, *supra*, 34 Cal.3d at p. 478.) The federal constitutional standard is one of gross disproportionality. (*Ewing*, at p. 1185 (plur. opn. of O'Connor, J.); *id.* at p. 1193 (dis. opn. of Breyer, J.); *Harmelin*, at p. 1001; *Cacoperdo v. Demosthenes* (9th Cir. 1994) 37 F.3d 504, 507-508.)

The California Supreme Court has instructed that, when reviewing a claim of cruel or unusual punishment, courts should examine the nature of the offense and offender, compare the punishment with the penalty for more serious crimes in the same jurisdiction, and measure the punishment to the penalty for the same offense in different jurisdictions. (*People v. Dennis* (1998) 17 Cal.4th 468, 511; *In re Lynch*, *supra,* 8 Cal.3d at pp. 425-427.) In the present case, however, defendant does not claim that the 10-year

gun use enhancement is disproportionate to the punishment under similar provisions in California or in other jurisdictions. Therefore, we limit our review in this case to the nature of the offense and offender. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214, 1216.)

Regarding the nature of the offense and the offender, we evaluate the totality of the circumstances surrounding the commission of the current offense, including the defendant's motive, the manner of commission of the crime, the extent of the defendant's involvement, the consequences of his or her acts, and his or her individual culpability, including factors such as the defendant's age, prior criminality, personal characteristics, and state of mind. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) Here, defendant armed himself with a shotgun to commit a robbery. He displayed the shotgun to the victims and told them not to move while his two friends demanded the victims' wallets. Although defendant was only 20 years old and had only one prior conviction (for tampering with an automobile, Vehicle Code section 10852), these factors are not determinative. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497.) Nor is it determinative that defendant has a learning disability. The evidence that defendant presented to the trial court regarding his learning disability falls far short of the evidence of extreme immaturity presented in *People v. Dillon*, *supra*, 34 Cal.3d at p. 485 that resulted in the reversal of a mandatory life sentence. In short, this is not one of those "rarest of cases" in which a court "could . . . declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez*, *supra*, 76 Cal.App.4th at p. 494.)[3]

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[3] Defendant requested that we take judicial notice of documents in the superior court file of the related case of one of defendant's two companions. Defendant contends that those documents show that the companion was sentenced to probation with one year in county jail for his participation in the robbery. We deny defendant's request because the companion's sentence is irrelevant inasmuch as, unlike defendant, the companion did not personally use a firearm in the commission of the robbery. (See *Mangini v. R. J.*

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063 [only relevant materials may be judicially noticed].)